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SHOULD THE MOTIVE OF THE DEFENDANT AFFECT THE QUESTION OF HIS LIABILITY? — THE ANSWER OF ONE CLASS OF TRADE AND LABOR CASES.

Motive and malice have been the subject of much learned legal controversy. One of the causes for conflict in the decisions on questions of tort is due to the fact that there is not only a conflict, but a confusion in opinion on the question whether the defendant's motive should be taken into consideration in determining his liability for the harm that his act has caused the plaintiff. The recent trade and labor cases in which the courts have been forced to deal with fundamental principles, because the questions presented were new, are naturally prolific of discussions of this question. The object of this paper is not to discuss the question whether motive should be considered as affecting liability, or whether, considering the law of torts as a whole, it is so considered, but to examine how far modern judges, dealing with new questions of alleged tort, have taken into consideration the motive of the defendant. The particular class of trade and labor cases which we shall examine are those in which the plaintiff complains that the defendant has persuaded third persons to break off or not to enter into business relations with him, or in which the plaintiff complains that the defendants have injured him by conspiring together and persuading each other not to deal with him.

The question whether the defendant's motive should be considered is immaterial until it has been determined that the harm of which the plaintiff complains, not only resulted from the defendant's act, but that it was or could have been foreseen to be by the defendant the natural result of that act. When this much has been ascertained the question whether the court should take into consideration the defendant's motive, or the cause which from the defendant's point of view made him will the act which has resulted in the plaintiff's harm, becomes of vital importance.

The motive of the actor is a desired result or results of his act. As here defined motive and purpose are synonymous. A, being in the same business as B, undersells him. A desired result in such cases is usually the money which A receives for his goods. This desire for money was the motive of his act. The motive was immediate; that is, the result desired was to result from the act of sale without any further act on A's part. There may have been, however, an ultimate motive; that is, a result which was not to be brought about by the sale, but by further acts in view of the receipt of the money. Thus A, in the illustration just given, may have undersold B to obtain money to pay a pressing creditor. Here, A's ultimate motive in underselling B was the desire to pay a debt. Or we may take another illustration. A assaults B. He regrets the harm he causes, but he wants B's position and believes a way to obtain it is to cripple B. Here the immediate motive of the assault was the desire to create a vacancy in a position held by B. This was merely a means to an end. The ultimate motive was the desire to obtain a position. All acts have an immediate motive,—the result which it is desired that that act without more shall bring about; but many, if not most acts, have one or more ultimate motives. Sometimes the ultimate motives of an actor are to be realized in the near future, and are therefore clear and strong; again they are not to be realized for a long time, and perhaps only after many preliminary acts, in which case they are apt to be indistinct. Unless otherwise stated when we use the word motive, immediate, not ultimate motive is meant.

With this preliminary explanation of the use of the term motive let us turn to the particular trade and labor cases selected for review. In these cases we find positive evidence that courts, in determining the question of the defendant's liability, disregard any event antecedent to the act, and in so far as such an event may be the cause for the motive, disregard such cause. We select two typical examples. In Casey *v.* Cincinnati Typographical Union,[1] one of the first cases in which it was decided that a body of persons could be restrained from threatening the customers of the plaintiff,

[1] (1891) 45 Fed. 135.

that they would no longer deal with such customers if the customers continued to deal with the plaintiff, the court refuses to consider the alleged antecedent conduct of the plaintiff as having any bearing on the propriety of the injunction. To the same effect is the opinion of the court in Brace Brothers *v.* Evans,[1] a somewhat similar case. Judge Slagle there says: "With the merits of the controversy this court has nothing to do." [2] That the character of the antecedent events which are the cause of the defendant's motive in doing the act of which the plaintiff complains may cause the court to be predisposed to favor one party or the other, is of course inevitable. Judges are but human. The fact that trade and labor cases often excite heated controversy among those in nowise connected with the case, makes it probable that the judge will have a decided opinion as to the merits from a public point of view, however little he may consciously allow this opinion to influence his decision.[3]

None of the trade and labor cases throw any light on the question whether the cause of the motive of the actor, as far as that cause is an event occurring at the time of the act, is or is not to be considered in determining the question of the defendant's liability. Cases which test this question are practically confined to those in which the defendant alleges that he acted in self defense, and the trade and labor cases are not cases of this character. The trade and labor cases, however, often involve a discussion of the question, whether motive itself is to be considered in determining the defendant's liability. There is much difference on this point between the English and American cases, and it therefore will be desirable to discuss them separately. The first English trade case in which the court deals with the subject is Bowen *v.* Hall.[4] The plaintiff sued on the ground that the defendant had caused third persons to break their contracts with him. In the course of his opinion Mr. Justice Brett, afterwards Lord Esher, says: "Merely to persuade a person to break his contract may not be wrong-

[1] (1888) 18 Pitts. L. J. 399. [2] *Ibid.* 404.

[3] See, for an extreme example of such a predisposition, the language of Jackson, J., in United States *v.* Haggerty (1902) 119 Fed. 510.

[4] (1881) 6 Q. B. D. 333.

ful in law or fact. * * * But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which in law and fact is a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it."[1] The purpose, or immediate motive of the defendant, was to secure the workmen, with whom the plaintiff had contracts, for his, the defendant's own benefit. Lord Esher reaffirmed the position taken in Bowen *v.* Hall, in his dissenting opinion in the Mogul Steamship Co. *v.* McGregor,[2] and in Temperton *v.* Russell.[3] In this last case the defendants had used economic coercion, the threat to strike, to induce a third person, not under contract with the plaintiff, to refuse to continue to deal with him. Lord Esher considered that an action would lie, not because of the coercion, or because of the coercion combined with the motive, which was in this case the desire to punish the plaintiff for dealing with a person obnoxious to the defendants, but solely because of the malicious motive.

It will be noticed that Lord Esher goes further than stating that the motive should be considered as an element in determining the defendant's liability for the harm which his act has caused. He apparently takes the position that motive is the only element to be considered. This is an extreme position.

It will also be noticed that Lord Esher uses the word malice in a different sense than that in which it is used in ordinary conversation. To him the word is a purpose which the law regards with disfavor. So to act as to advance yourself at the expense of another is to act with a motive or purpose which the law, according to Lord Esher, regards as wrongful, and as therefore illegal. An act done with a malicious purpose is an act done with a wrong purpose, and an act done with a wrong purpose is an illegal act if harm to another results. Thus malicious and wrongful, as these words are used by him, are synonymous. As applied to an act the term malicious when used in popular speech denotes that the act was done, not only because it would

[1] *Ibid.* 338. [2] (1889) 23 Q. B. D. 598, 608. [3] (1893) 1 Q. B. 715, 728.

cause harm to another, but because of the pleasure which the actor believed he would have in the existence of that harm. Thus malice in the popular sense is not synonymous with wrong, but is synonymous with ill will.

Lord Esher is practically the only English judge in the cases under review to regard motive as the sole test of the defendant's liability. Several other judges, however, have considered that if the immediate motive of the defendant was malicious in the popular sense of that term, this would be sufficient, in some cases at least, to make a defendant liable who would not be liable had he acted from another motive. This position was taken by at least three of the judges in the case just referred to, the case of Mogul Steamship Company *v.* McGregor.[1] This was a case in which the plaintiffs sued to recover for injury to their business. The defendants being several companies engaged in the Chinese foreign transportation trade, agreed that for "the good of the business" they would form what they called a "conference." The object of the "conference" or "trust" was to eliminate competition between the members, and prevent any person or companies other than members from engaging in the Chinese foreign transportation trade. The plaintiff Company entered the business. In order to carry out the object of the trust and exclude the plaintiff Company from the business, when the plaintiff would send a ship up the Yanste to Hankow, the defendants would also send a ship to Hankow with instructions to obtain a cargo, no matter how unremunerative the rate paid by the shippers. This was done so as to make it certain that the plaintiff would fail to obtain a cargo at remunerative rates and therefore lose money on the voyage. There were other acts on the part of the defendants all tending toward the same result, the exclusion of the plaintiff from the trade, but the one mentioned is the only one to which the judges gave serious attention. The case was tried before Lord Chief Justice Coleridge without a jury. He gave judgment for the defendants. This judgment was affirmed in the Court of Appeal, Lord Esher dissenting, and subsequently unanimously confirmed in the

[1] (1888) 21 Q. B. D. 544; aff. in (1889) 23 Q. B. D. 598; aff. in [1892] A. C. 25.

House of Lords. Mr. Justice Bowen in the Court of Appeal,[1] and Lord Halsbury, the Lord Chancellor,[2] and Field,[3] in the House of Lords, admit that had the defendants' action been for the sake of harm or for an unlawful or purely malicious purpose, the plaintiffs would have had a right of action. Mr. Justice Fry[4] in the Court of Appeal, and Lords Morris[5] and Hannen,[6] discuss the object or motive of the defendants, the exclusion of the plaintiffs from the trade and the establishment of a monopoly, thereby admitting that motive is an element tending to throw light on the question of the defendants' liability. All three regard the motive as lawful.

At the same time, the opinion that motive, or the opinion that at least a malicious motive, using the word malicious in its popular sense, should be considered in cases of tort was not unanimous. Lord Chief Justice Coleridge, in his dissenting opinion in Bowen *v.* Hall[7] maintained, that the presence or absence of malice, meaning ill-will, could not affect the question of a defendant's liability. Lord Bramwell, in the Mogul Steamship Company *v.* McGregor,[8] does not consider the purpose of the defendants to exclude the plaintiff from the Chinese foreign transportation business as apparently having anything to do with the question presented by the cases.

This difference of opinion, coupled with the extreme position taken by Lord Esher, caused the question of the effect of motive and malice to be elaborately examined in the now celebrated case of Allen *v.* Flood.[9] The plaintiffs were shipwrights. The defendant was an officer in the Iron Shipbuilders' Union. A rule of this union declared that no one who worked on wood in ships should also work on iron. The plaintiffs, not being members of the union, violated the rule. They were subsequently employed by the Glengall Company, shipbuilders, to work on wood. The iron workers in the employ of the company wanted the plaintiffs discharged, and sent for Allen. Allen went to the officers of the company and procured the discharge of the

[1] (1889) 23 Q. B. D. 618. [2] [1892] A. C. 37. [3] *Ibid.* 52.
[4] (1889) 23 Q. B. D. 625. [5] [1892] A. C. 49. [6] *Ibid.* 59.
[7] (1881) 6 Q. B. D. 343. [8] [1892] A. C. 44.
[9] [1898] A. C. 1, aff. S. C., *sub nom.* Flood *v.* Jackson (1895) 2 Q. B. 21.

plaintiffs by stating, that unless they were discharged, the iron workers in the company's employ would strike. In discharging the plaintiffs the company did not violate any contract with them. The majority of the judges in the House of Lords thought that Allen had done nothing to create the feeling against the plaintiffs on the part of the iron workers, and that these iron workers would have struck of their own accord had not the company discharged the plaintiffs. Allen, in accordance with this view, had not caused the harm of which the plaintiffs complained, and, of course, he could not be held liable for that harm. The case, however, had been discussed by the trial judge, and subsequently by the Court of Appeal, on the assumption that Allen had caused the plaintiffs' discharge. On the same assumption the case was discussed by the judges to whom it was referred by the House of Lords. In all twenty-one judges passed on the case, and nearly all discussed the effect of motive or malice. Mr. Justice Kennedy, before whom the case was tried, Lord Esher and his associates in the Court of Appeal, acquiesce in Lord Esher's views, as expressed in Bowen *v.* Hall. Six of the eight judges to whom the case was referred by the House of Lords regard "malicious motive" as a factor in determining a defendant's liability in tort,[1] though there are several of these judges who admit that there are classes of acts, such as certain uses which a man may make of his own land, which, though harm result to others, a man has an absolute right to do irrespective of his motive.[2] All these judges use the word malicious in a slightly different sense than that in which the word is used in popular speech. As has been pointed out, in ordinary use the word malice refers to the subjective as well as the objective element of desire. It not only indicates desire for harm, but that the actor derives pleasure in contemplating the harm he is about to cause. Now Allen, in the case under consideration, wanted to punish the plaintiffs for what they had done, but, as was pointed out by Lord Herschell, he did not have any pleasure in the harm

[1] [1898] A. C. 19, op. of Hawkins, J.; *Ibid.* 32, 37, op. of Cave, J.; *Ibid.* 40, 42, op. of North, J.; *Ibid.* 45–46, op. of Wills, J.; *Ibid.* 53, 54, op. of Grantham, J.; *Ibid.* 61, op. of Lawrence, J.

[2] See especially opinions of North and Wills.

considered by itself.[1] In other words, he had no ill-will. He wanted to inflict the harm so as to deter others from breaking the rules of the union. Lord Herschell uses the word malice in its ordinary sense, while the other judges use it to include all cases in which the defendant desired the harm which his act caused. In the House of Lords itself three of the judges, Lord Chancellor Halsbury,[2] Lord Asbourne,[3] and Lord Morris,[4] all thought that malicious motive, in the sense of a desire to harm, though not necessarily ill-will, was the element in the case which made Allen liable for any harm which his act may have caused the plaintiffs. These opinions, however, were not acquiesced in by two of the judges to which the case was referred, Justice Mathew,[5] and Justice Wright.[6] They thought that the defendant's motive had no bearing on the question of his liability. The majority of the members of the House of Lords took the same view. Lords Watson,[7] Macnaughten[8] and Davey,[9] to use the exact words of the former, declare that "the law of England does not take into account motive as constituting an element of civil wrong." Lord Herschell appears to go even farther. He apparently would not only disregard the motive of the defendant, using motive in the sense of purpose, but also the actual consequences of the defendant's act, thus confining his inquiry to the act itself, or what may be called the method by which the harm was inflicted.[10] If this is a correct interpretation of his opinion it will be observed that Lord Herschell took a view the opposite of that of Lord Esher, who in investigating the question of a defendant's liability for the harm caused by his act, apparently disregarded the act, or means by which the harm was inflicted, and confined his attention to the defendant's motive. Of the twenty-one judges writing opinions in this case thirteen regard motive, as far as motive is purpose, as an element which affects the question of liability; while six are of a contrary opinion, and two do not express their views. Again, the word malice is not used by all the judges in the same way. To some it is ill-will, to others it includes not only ill-will, but a desire for the

[1] *Ibid.* 131. [2] *Ibid.* 85. [3] *Ibid.* 114. [4] *Ibid.* 159. [5] *Ibid.* 25.
[6] *Ibid.* 64. [7] *Ibid.* 92, 96. [8] *Ibid.* 151. [9] *Ibid.* 171. [10] *Ibid.* 121.

plaintiff's harm, irrespective of the presence or absence of ill-will, while to Lord Esher who uses the word in a technical sense, a malicious act is an act done with an illegal purpose. As we shall see presently Mr. Justice North, one of the judges to whom the case was referred by the House of Lords, also uses the word in a purely technical sense, but not in the same sense as Lord Esher.

The more recent case of Quinn *v.* Leathem[1] has not served to lessen the confusion which surrounds the subject. That case practically was identical with that part of Temperton *v.* Russell to which I have already referred.[2] The defendants had used economic pressure, the threat of a strike, to force the plaintiff's customers to cease dealing with him. The unanimous opinion of the House of Lords was that the plaintiff had a cause of action. The members differ, however, in their reasons for this conclusion as well as on the question of the effect of motive. Lord Macnaughten says, that "an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."[3] The words are quoted by Lord Macnaughten from Park B. in Stevenson *v.* Newnham.[4] Intent is here used as synonymous with purpose and to that extent with motive. The words "legal injury" must mean harms due to acts which are at least *prima facie* legal; else the sentence, in assuming the whole matter in controversy, which is the legality of the defendants' acts, has no meaning. Lord Lindley agrees with Lord Macnaughten's view.[5] Lord Shand, on the other hand, points out that the chief difference between Allen *v.* Flood and the case under consideration is the difference in the purpose of the defendants.[6] Lord Brampton[7] as Justices North and Wills in Allen *v.* Flood, regards the presence or absence of ill-will or malicious motive as having an effect in certain cases; that is, cases in which the defendant has not an absolute right to do what he has done.

In view of this confusion of opinion on such a funda-

[1] [1901] A. C. 495.

[2] The question raised by the plaintiff's second count. In Temperton *v.* Russell the plaintiff's first count merely raised the same question which had already been decided, Bowen *v.* Hall, *supra.*

[3] *Ibid.* 508, 509. [4] (1853) 13 C. B. 297.

[5] *Ibid.* 533. [6] *Ibid.* 514. [7] *Ibid.* 524.

mental question in the law, it is impossible to foretell how the highest court in England will decide the next novel case of alleged tort which may arise.

The American judges reflect to some extent the uncertainty of the English. Several courts have expressly declared that motive has nothing to do with the question of liability. The earliest case of this kind, of the class under review, is Hunt *v.* Simonds.[1] The plaintiff's statement charged that the defendants had maliciously conspired to ruin him, and to effect his injury had refused to insure his boat. The court declared that the statement did not set forth a cause of action, because it did not show that the defendants had done an illegal act.[2] Justice Mitchell, of the Supreme Court of Minnesota in Bohn Manufacturing Company *v.* Hollis[3] said: "If the act be lawful,—one that the party has a legal right to do,—the fact that it may be actuated by an improper motive does not render it unlawful." In this case the defendant, an officer in a retail lumbermen's association, was about to send out circulars to the members of the association telling them that under the rules of the association they should not deal with the plaintiff. The defendant's motive was to punish the plaintiff, a wholesale lumber merchant, for selling directly to a consumer rather than through a member of the association, and by the defendant's punishment deter other wholesalers from selling directly to consumers. The injunction asked for by the plaintiff was, as is indicated by the opinion quoted, denied.[4] Justice Mitchell cited in favor of his view the opinion of Chief Justice Appleton of Maine in Heywood *v.* Tillson,[5] in which that judge declares, that the defendants act being legal, "he cannot be sued for mere ill-will." The apparent motive of the defendant in Heywood *v.* Tillson was either ill-will due to a past affront, or im-

[1] (1854) 19 Mo. 583, at p. 589.

[2] *Cf.* Ertz *v.* Produce Exchange (1900) 79 Minn. 140.

[3] (1893) 54 Minn. 223, 233.

[4] The opinion of Mitchell J. is in effect overruled by Ertz *v.* Produce Exchange (1900) 79 Minn. 140. The facts of the two cases are "distinguished" by the court, but motive is treated as the deciding factor in the later case. To the same effect; see; Olive *v.* Van Patten (1894) 7 Tex Civ. App. 630.

[5] (1882) 75 Me. 225, 234.

provement in the moral efficiency of his, the defendant's, employes The act of which the plaintiff complained was a notice posted by the defendant warning his employes, that if they rented the plaintiff's house the defendant would discharge them. We also find Chief Justice Parker, in National Association *v.* Cumming,[1] deprecating the tendency which he observes to regard motive as an element in determining a question of alleged tort. In the case before him the defendants had caused the plaintiff's discharge by notifying their employers, that unless the employers discharged the plaintiffs their other employes, members of a rival labor union to that which the plaintiffs belonged, would leave their employ. The court held that the defendants had not acted unlawfully. The immediate motive of the defendants in this case was to secure for the members of their organization a monopoly of the trade. The ultimate motive was in part to secure their own economic advancement and in part to improve the conditions of labor in the trade.[2]

The general trend of authority in this country, however, as expressed in the trade and labor cases, is to regard motive as an element affecting the question of the defendant's liability. The leading case is Walker *v.* Cronin.[3] This was a civil suit for damages for interference in the business relations of the plaintiff, a manufacturer, and his employes. The first count in the plaintiff's declaration set forth that the defendant and others did, "without justifiable cause, molest, obstruct and hinder the plaintiff from carrying on said business * * * and wilfully persuaded and induced a large number of persons who were in the employ of the plaintiffs as bottomers of boots and shoes as aforesaid, and others who were about to enter into the employment of the plaintiffs and who were skilled in the art of bottoming boots and shoes, to leave and abandon the employment of the plaintiffs, without their consent and against their will."[4] The court thought that the plaintiff stated a

[1] (1902) 170 N. Y. 315, 326.

[2] For cases *contra* to National Association *v.* Cumming on identical facts; see, Plant *v.* Woods (1900) 176 Mass. 492, and Erdman *v.* Mitchell (1903) 207 Pa. 79.

[3] (1871) 107 Mass. 555.

[4] *Ibid.* pp. 556, 557.

cause of action. Justice Wells, after stating the substance of the count says:

"This sets forth sufficiently (1) intentional and wilful acts (2) calculated to cause damage to the plaintiffs in their lawful business done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) actual damage or loss resulting.[1]

It is first to be observed that Justice Wells here uses the word malice in a sense which we have not before noted. We find the same use in the opinion of Mr. Justice North in Allen *v.* Flood.[2] The latter says: "A malicious act has been described in hundreds of cases, both civil and criminal, as a wrongful act done intentionally without just cause and excuse." So also Justice Bowen in Steamship Company *v.* McGregor says, speaking of acts which cause harm; "Such intentional action when done without just cause and excuse is what the law calls a malicious wrong."[3]

Malice as denoting an absence of legal excuse has no connection with that word as used in common speech. It does not even imply that the defendant's motive, not to say his malicious motive in the ordinary sense of that term, has anything to do with liability. It would appear, however, that the popular use of the term has had an effect. Those who say with Justice Wells that a man is liable for the harm he does if he does it maliciously, meaning by malice without legal excuse, naturally turn to the defendant's motive as at least one of the elements on which the existence of a "legal excuse" depends. Thus in Walker *v.* Cronin Justice Wells states that the defendant's motive may be the deciding factor

[1] *Ibid.* 562. [2] [1898] A. C. 40.

[3] (1889) 23 Q. B. D. 613. There is a difference, however, between Justice North, Justice Wells and Justice Bowen, in the way they regard a question of alleged tort, though both use the word malice as denoting an absence of just cause and excuse. The difference between the judges is as to what constitutes *prima facie* liability in tort. To Justice Wells harm to the plaintiff knowingly inflicted by the defendant is sufficient; to Justice North the act which inflicts the harm must have the element of unlawfulness for he adds: "The element of wrongfulness is essential, and an act which *ex hypothesi* is not wrongful or tortious cannot in accurate legal phraseology be a malicious act." Justice Bowen on this question takes the same position as the American judge. He says: "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause and excuse." [4] *Ibid.* 613.

in the question of his liability. While he would not protect a person from harm to his business through competition, he would protect him from "wanton interference, disturbance and annoyance."[1]

The way in which the question presents itself tends to bring about this result. In the English opinions in which malice and motive were expressly disregarded it is evident that the fact that the defendant has knowingly acted so as to injure the plaintiff does not of itself produce a mental presumption of the defendant's liability. If, therefore, there is nothing raising the presumption of liability in the method by which the harm has been inflicted, the question whether motive is or is not to be considered presents itself in the following form: Can a bad motive make a legal act illegal? To Justice Wells, however, the defendant, having knowingly caused the harm, is liable unless he can show a legal excuse. To him, therefore, the question is whether the character of a man's purpose should ever be taken into consideration to show that he had a legal excuse for the harm which he has caused the plaintiff, and for which he would otherwise be liable? This question, as we have seen, he unhesitatingly answered in the affirmative. This opinion has been followed by Judge Taft in Moores *v.* The Bricklayers' Union,[2] and by the Supreme Court of Texas in Delz *v.* Winfree.[3] In this last case the court hold, that a man will or will not be liable according to his motive, if he has persuaded with effect another to stop dealing with the plaintiff. While it is admitted that a person may have an absolute right to refuse to have business relations with any other person, though the refusal may be based on whim or malice, it is affirmed that this privilege must be limited to the person asserting the right. "It is not equally true," says Justice Henry, "that one person may from such motives influence another to do the same thing."[4] In Macauley *v.*

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[1] (1871) 107 Mass. 555, 564. [2] (1889) 23 Ohio Wk. Bul. 48.

[3] (1891) 80 Tex. 400.

[4] (1891) 80 Tex. 404. This case and the language quoted is expressly followed in Olive *v.* Van Patten (1894) 7 Tex. Civ. App. 630, 636. The facts in this last case were almost identical with those in Bohn Manufacturing Co. *v.* Hollis (1893) 54 Minn. 223. As in that case the plaintiff was a wholesale lumber dealer, and the defendants officers of a retail lumbermen's association. The defendants were sending out circulars to their

Tierney[1] the Supreme Court of Rhode Island hold that a commercial motive, the desire for economic advancement, is a legal excuse for a boycott. The courts which hold that a boycott is illegal may be regarded as doing so not because they disregard motive, but because they regard the motive of self-advancement, though laudable, as not sufficient to excuse harm produced by economic pressure on the customers of rivals or employers.[2] In Mattison *v.* Lake Shore and Michigan Southern Railway Company,[3] the Court of Common Pleas of Lucas County, Ohio, held a declaration good which set forth that the defendant company had conspired with others to "blacklist" the plaintiff, a former employe. In this case the court apparently regarded the motive of the defendant as a determining factor.[4] So also, in the case of Ertz *v.* Produce Exchange[5] the Supreme Court of Minnesota overruled a demurrer to a declaration, that one defendant, the Produce Exchange, conspired with the other defendants, and "did maliciously solicit and procure from all its co-defendants, and each of them, and from many other persons to the plaintiff unknown, an agreement not to sell to, or buy from, plaintiff * * *." They distinguish the case from Bohn Manufacturing Company *v.* Hollis,[6] because in the former case the defendants had legitimate interests to protect, while in the case before them it is expressly alleged that the combination "was for the sole purpose of injuring the plaintiff's business."[7] The apparent position taken in these

own members in accordance with their by-laws asking them not to deal with the plaintiffs, as the plaintiffs had violated a rule of the defendants' association in selling directly to a consumer. In the Texas case, however, the defendants were also sending the circular to other persons not members of their association. The court thought the plaintiff had a cause of action. Compare International and Great Northern Ry. Co. *v.* Greenwold (1893) 2 Tex. Civ. App. 76, 80.

[1] (1895) 19 R. I. 255, 260.

[2] A collection of the cases in law and in equity in which a "boycott" has been held a tort will be found in the author's notes to the leading case of Casey *v.* Cincinnati Typo. Union (1891) 45 Fed. 135, printed in his Cases on Restraint of Infringement of Incorporeal Rights, pp. 241-247.

[3] (1895) 3 Ohio Sup. & C. P. Decs. 526, 527.

[4] It must be admitted, however, that the opinion is not entirely clear.

[5] (1900) 79 Minn. 140.

[6] (1893) 54 Minn. 223, *supra*.

[7] (1900) 79 Minn. 144, 145.

cases which follow Walker *v.* Cronin is well summed up by Justice Hammond in Plant *v.* Woods, a case identical with National Association *v.* Cumming, when he says, referring to the opinions expressed by the majority of the House of Lords in Allen *v.* Flood to the effect that motive should not be taken into consideration:

"If the meaning of this and similar expressions is that where a person has a lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person if actuated by one motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive * * * the proposition does not commend itself to us as either logically or legally accurate."[1]

The conclusion then from an examination of the trade and labor cases in this country is, that though there are cases to the contrary, the rule is to consider the motive of the defendant as a factor in determining the question of his liability for the harm which his act has caused the plaintiff.

As stated in the first part of this paper, it is no part of the present object of the writer to discuss whether motive should or should not be considered in cases of alleged tort. There is, however, one fact which may with advantage be pointed out. We have seen that most judges, who take the position that motive in the sense of purpose should be taken into consideration also start with the proposition, that if the natural consequences of the defendant's act was the harm of which the plaintiff complains, the defendant is liable unless he can show legal excuse. Thus the harm to the plaintiff, if it is a natural consequence of the defendant's act, is a consequence of the defendant's act which, according to the view indicated, is taken into consideration in determining the defendant's liability. But, if one natural consequence of

[1](1900) 176 Mass. 492, 499. It is interesting to note that while Justice Holmes in this case agrees with the majority of the court in thinking that motive should be taken into consideration, in deciding whether the defendants had or had not a legal justification for their acts, he differs from a majority in believing that the immediate object of the defendants' acts, which was to force out of existence a rival union, was a justification for the harm done the plaintiffs by the economic pressure brought to bear on the employers to effect the plaintiffs' discharge. He takes this position because he believes that monopoly of labor in a particular trade by one trade union is necessary to effect the improvement of the laborers as a class, and is, therefore, an object tending to excuse the defendants. *Ibid.* p. 504. Note also opinion of Justice Holmes in May *v.* Wood (1898) 172 Mass. 11, 14, 15, and his opinion in Vegelahn *v.* Gunter (1896) 167 Mass. 92, 104.

the defendant's act is taken into consideration to determine the question of his liability, why not all other natural consequences? And if we should take into account all the natural consequences of the act, may it not be asked what difference should it make that the defendant desired those consequences or did not desire them? In other words, what difference should it make that a particular consequence was or was not the motive of the defendant? Again, if the only consequence of an act is harm to another, should the law in any case determine the actor's liability to the injured person by the pleasure or pain which he, the actor, obtained from contemplating the harm he had caused? If this should not be taken into consideration, it means that malice in the sense of ill-will should have no effect on the defendant's liability.[1]

In most cases there are not any natural consequences of the defendant's act, except perhaps the harm to the plaintiff, which are not the desired results of that act. This is true of all the trade and labor cases falling under the class which we have discussed. In these cases, it does not make any difference in the legal result whether one takes into account motive in the sense of purpose, or, disregarding motive, looks at all the natural consequences of what the defendant did. All the cases which have been cited in which motive was regarded as material, would have been decided the same way had motive been disregarded, but the consequences of the defendant's act considered. When, however, we have a case in which some of the consequences, though not desired, are nevertheless a natural result of the act, there may be and probably will be a different legal conclusion reached in accordance with whether we regard motives or consequences as the factor to be examined in determining the defendant's liability. So also in cases where the natural consequences of the defendant's act taken as a whole would excuse the defendant for the harm he has done the plaintiff, the court may hold the defendant

[1] Of course the natural consequence of an act does not have to have actually occurred to be taken into consideration. Just as a man is not liable for accident, that is harm which is not the natural consequence of his act, so the mere fact that an accident has deprived an act of one of its natural consequences, should not deprive the defendant of the legal excuse which that consequence, had it occurred, would have given him.

liable or not according as to whether malice in the sense of ill-will is considered as affecting liability.

We have so far spoken of motive as meaning immediate not ultimate motive; of consequence as meaning immediate not ultimate consequence. Ultimate motive is, as we have stated, the desired result which the actor expects to bring about, not by the act which caused the harm for which the plaintiff seeks redress, but the result which is to be brought about by further acts on the part of the defendant. There is no positive evidence in any trade and labor case that courts ever regard the ultimate motives of the defendant as something which should effect the question of his liability.[1]

It would appear that there is no justification for looking beyond the immediate motive of the actor when investigating his liability for the harm caused by his act, though, of course, the ultimate motive may often be important, to those who take into consideration the immediate motive, as indicating the real immediate motive of the actor. For the private law in questions of tort to take into consideration ultimate motives would be as if the criminal law should, in extenuation of an actual killing, take into account the fact that the slayer intended to advance himself in business by securing the deceased's trade.

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[1] There is room for argument that Justice Bowen in Steamship Co. *v.* McGregor (1889) 23 Q. B. D. 614. 615, and Justice Holmes in his dissenting opinion in Plant *v.* Woods (1900) 176 Mass. 504, take into account the ultimate motive of the defendants to advance themselves economically as a justification for the harm which they inflicted on the plaintiffs. The writer does not believe that this conclusion should be drawn from either opinion. Justice Holmes, for instance, regards the desire of the defendants to have but one union in the trade as a laudable purpose, and as such a justification for the defendants' act. It is this laudable purpose, the immediate motive, which he considers, though he comes to the conclusion that it is a laudable purpose because the condition of the worker can be improved most effectively through united effort.